UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRIUMPH AEROSTRUCTURES, VOUGHT AIRCRAFT DIVISION		
and	**Case Nos.**	**16-CA-197912**
		16-CA-198055
LAWRENCE HAMM, and Individual		**16-CA-198410**
		16-CA-198417
and		
RODNEY HORN, an Individual		
and		
THOMAS SMITH, an Individual		
and		
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA, LOCAL 848		

TRIUMPH'S REPLY BRIEF TO UAW LOCAL 848'S ANSWERING BRIEF TO TRIUMPH'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Respondent Triumph Aerostructures ("Triumph" or "Company") files this reply brief in support of Triumph's cross-exceptions to Administrative Law Judge Robert A. Ringler's September 30, 2019 decision ("ALJD"). Triumph's cross-exceptions present *additional grounds* to affirm the judge's dismissal of the Complaint.

The Union did not except to the judge's dismissal of the discipline allegations. As to the bond shop layoff allegation, the Union's answering brief (1) contains impermissible argument not linked to Triumph's cross-exceptions, (2) goes beyond the scope of the General Counsel's legal positions in the case, and (3) raises inaccurate factual and legal arguments. Triumph addresses each of these flaws below.

I. The Board Should Summarily Reject the Union's Attempt to Rehash Its Own Exceptions Arguments in Response to Triumph's Cross-Exceptions.

Section 102.46(d) of the Board's Rules and Regulations make clear that an answering brief to cross-exceptions "must be limited to the questions raised in the cross-exceptions." Ignoring that restriction, the Union devotes at least six pages to its own exceptions. For example, the Union rehashes whether the ALJD provides an adequate basis for Board review (*see* U. Br. at 32-33) and whether the judge properly found an economic exigency on this factual record (*see* U. Br. at 33-37). None of these arguments were raised in Triumph's cross-exceptions.[1] The Board should thus reject the Union's attempt to *triple argue* its exceptions on this basis alone.

Even considering the Union's exigency claim, however, the Board can easily dispense with the Union's belated effort to undercut the parties' joint stipulation that the expedited

[1] As explained in Triumph's answering brief to the Union's exceptions, these arguments are also outside the scope of the General Counsel's theory of the case and therefore improper. *See* R. Answering Br. to the U. at 5-7.

economic exigency bargaining framework – and not traditional "contract" bargaining concepts – applied in this case. The Union's claim that there was no "exigency" that required Triumph to take prompt action because the bond shop overstaffing problem in March and April 2017 was a "garden-variety cost-cutting measure" (U. Br. at 34-35), is contradicted by the record (*see* R. Br. at 9-10). And in any event, it is foreclosed by the parties' *joint stipulation* – specifically, the General Counsel's express disavowal of any allegation Triumph's "business rationale [a decrease in anticipated orders from customers Bell and Gulfstream that impacted bond shop staffing needs] failed to qualify as exigent circumstances" (Jt. Exh. Z at 19), which limits the scope of bargaining under *RBE Electronics of S.D.*, 320 NLRB 80 (1995). *RBE* sets forth an exception to the duty to refrain from implementing unilateral changes during negotiations where "an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely." *Id.* at 82. The Union does not argue – nor could it given the stipulation – that Triumph was required to bargain to overall impasse on a collective bargaining agreement before implementing the layoff, and the Union thus fails to reconcile its argument that there was no economic exigency with the parties' joint stipulation and Board precedent under *RBE* defining the duty to bargain.

II. The Union Offers No Effective Rebuttal to the Company's Central Argument That Bargaining in This Context is Not Protracted.

Under the "economic exigency" doctrine and expedited bargaining framework, Triumph easily satisfied its bargaining duty with the 24 days' advance notice and extensive bargaining that occurred. "In such time sensitive circumstances, … bargaining, to be in good faith, need not be protracted." *RBE Electronics*, 320 NLRB at 82. In fact, the Board requires that such negotiations can "occur in a timely and speedy fashion." *Lapeer Foundry & Machine*, 289

NLRB 952, 954 (1988). Triumph has not argued that there exists some automatic standard or minimum days of notice, but rather in this case that timeline *more than sufficed.*[2]

Despite this framework, the parties' joint stipulation, and the evidence showing the bond shop would be overstaffed after Friday, April 21, 2017 (R. Br. at 9-10), the Union asserts Triumph had to delay the layoff and keep bargaining. The Union admits that it "does not argue in this case that the number of days of notice given by the employer was insufficient on its face," but instead claims that the bargaining was not sufficiently *meaningful*. U. Br. at 41. This claim is belied by the objective record of meaningful bargaining – numerous, good faith proposals and compromise offers from the Company between April 5 and April 19, including a temporary loan program for impacted bonders; a permanent transfer right to the assembly department for impacted bonders with compensation commensurate with assembly experience; and modified selection procedures that balanced seniority rights and performance rankings. The Union rejected *all* of these compromise offers and should not now be permitted to relitigate the bargaining, years later, by claiming it was not "meaningful." Under the Union's theory, Triumph would have been required to continue employing all 97 employees in the bond shop without sufficient work after April 21, 2017. This is not what the Act requires.

Further, the Union offers no rebuttal to Triumph's argument that the scope of any bargaining obligation should be viewed in light of the status quo RIF policy at Red Oak. This policy, which defines the steps and procedures to follow where a given department or unit is

[2] In fact, finding a bargaining violation in this case tied to the bond shop layoff would be unprecedented because no other employer that has offered such early notice, and that engaged in such extensive bargaining over compromise proposals, has been found liable under Section 8(a)(5) in a similar context. *See* R. Br. at 26-28.

overstaffed, is relevant to the scope of pre-implementation bargaining in exigent circumstances.[3] It should be undisputed that during a first contract bargaining period, an employer has a legal obligation to maintain status quo policies and procedures. Triumph invoked the RIF policy when it notified the Union on March 28, 2017, and then used that policy 24 days later when the parties failed to reach any agreement to deviate from it. In cases involving analogous facts, the Board has limited the scope of the employer's pre-implementation bargaining obligation, or imposed *no* decision bargaining obligation at all. *See, e.g.*, *Monterey Newspapers, Inc.*, 334 NLRB 1019, 1020-21 (2001) (holding successor employer had *no* duty to bargain before setting new hire wage rates where it followed its lawfully-implemented status quo policy, despite the discretion involved in setting starting wage rates within pay bands); *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1117 (D.C. Cir. 2018) (noting that "[t]he Board's General Counsel declined to take any enforcement action" based on charges challenging employer's decision to implement layoffs without providing any notice or bargaining before implementation because "Tramont had permissibly 'set initial terms and conditions of employment,'" including a layoff policy that set forth a selection procedure and "the layoff decisions complied with these terms") (citing Letter from Richard F. Griffin, Jr., General Counsel, NLRB (Aug. 21, 2015)). The Union's assertion that Triumph failed to satisfy its bargaining obligations under the facts of this case conflicts with Board precedent regarding bargaining in exigent circumstances and where a lawfully-implemented policy covering the subject exists, and should be rejected.

[3] The RIF policy provides Triumph will "assess[] the remaining and future statement of work and determine the skills and abilities needed to perform the remaining and future statement of work … [and] then determine the RIF units and classifications where reductions will occur." ALJD at 4:20-41; Jt. Exh. A. It also provides selection will be based on the "rack and stack" performance ranking method using identified factors. *Id.* The parties also stipulated that the General Counsel does not allege this policy "involved the exercise of impermissibly broad discretion." Jt. Exh. Z at 33.

III. The Union Did Not Pursue Bargaining Over the Decision to Reduce Bond Shop Headcount Under the RIF Policy, and Thus Waived Decision Bargaining.

Assuming, despite the exigent circumstances and status quo RIF policy, Triumph still had to engage in fulsome decision bargaining before implementing the layoff, the Union waived decision bargaining and instead focused on effects bargaining. The relevant "decision" here is defined by the Company's need to reduce bond shop headcount (from 97 employees down to somewhere in the range of 82 to 91) under the status quo RIF policy, as proposed in Triumph's March 28, 2017 letter to the Union, and *not* whether the impacted employees could remain employed via loan or transfer to other departments. The Company had no operational need to reduce the overall size of the bargaining unit in the March-April 2017 timeframe – only the bond shop. The Union never pursued any bargaining over alternatives that would keep the bond shop headcount the same (e.g., creating part-time positions, eliminating overtime, implementing hours reductions, etc.), and thus waived decision bargaining. *See* R. Br. at 11.

The Union asserts that decision bargaining here encompassed both the decision to reduce bond shop staffing levels *and* whether the impacted bonders would remain employed at Red Oak after April 21, 2017. U. Br. at 42-44. As Triumph explained in its cross-exceptions brief, the Union's position on the scope of Triumph's decision bargaining obligation here is inconsistent with economic exigency bargaining and the status quo RIF policy. Triumph needed to reduce bond shop headcount because it had no work for all 97 bonders in the department. The Union ignored that decision and instead turned to whether the individuals removed from the bond shop temporarily or permanently could find alternative employment in other jobs within the bargaining unit. Certainly, by April 14, 2017 – 7 days before the layoff was implemented – the Union's own letter made clear the Union understood that a layoff of bond shop employees *would occur*, and suggested only effects issues that it "would like to see" for the impacted department.

Jt. Exh. Q ("[I]t appears the two parties might not reach an agreement concerning a layoff procedure in a timely manner for the bond shop layoffs that are upon us.").

The Union's belated effort to merge all of these issues into one combined "decision" overcomplicates the duty to bargain prior to implementing an economically-motivated change under exigent circumstances. Instead, the Board should conclude the Union waived decision bargaining (by April 14 at the very latest) by failing to pursue it and focusing on the effects of the planned bond shop staffing reduction instead.

IV. The Union's Extreme Claim That Effects Bargaining Must Be Completed or Reach Impasse Prior to Implementation Should Be Rejected.

As Triumph alternatively argued in cross-exceptions, because effects bargaining need not result in an agreement or impasse *before* implementation, Triumph satisfied all of its pre-implementation bargaining obligations and the General Counsel does not allege Triumph violated any post-implementation bargaining duties. While the General Counsel does not assert that employers must bargain to agreement or impasse over effects before implementation, the Union makes this argument in its answering brief to Triumph's cross-exceptions. The Union asserts the Board "has held consistently that effects bargaining must be completed prior to implementation" (U. Br. at 44), but cites no such Board decisions supporting this claim.

Contrary to the Union's assertion, the Board has long held that effects bargaining ordinarily should *begin* prior to implementation, but the Company has not found – and the Union does not cite – any cases holding that effects bargaining must be *finished* prior to implementation. *See, e.g.*, *Allison Corp.*, 330 NLRB 1363, 1366 (2000) (noting employer's general "duty to give pre-implementation notice to the union to allow for meaningful effects bargaining") (internal quotations and citations omitted). Rather, the Board has recognized that meaningful effects bargaining can occur even after a decision is implemented. *See, e.g.*,

Komatsu Am. Corp., 342 NLRB 649, 650 (2004) (finding that meaningful effects bargaining occurred both before and after employer implemented its decision); *Creasey Co.*, 268 NLRB 1425 (1984) (finding the parties engaged in meaningful bargaining concerning the effects of facility closure where the union was informed on November 2 that the company would close on November 5, and the parties met on November 3, 4, 10, and 15, and December 12 to discuss closing-related issues raised by the union); *see also NLRB v. Okla. Fixture Co.*, 79 F.3d 1030, 1036 (10th Cir. 1996) (finding one-day notice of terminations was sufficient for meaningful effects bargaining to occur because "this effects bargaining could be meaningfully conducted even after the employees were removed from the payroll"; noting that the "window for meaningful effects bargaining … does not automatically close upon the implementation of a termination decision").

Here, the Union had the opportunity to engage in bargaining over both the layoff decision and effects prior to April 21, but chose to pursue bargaining over effects issues only. Ultimately, it is the union's choice of when and how to pursue its bargaining rights, not the employer's choice. *Cf. DeSoto, Inc.*, 278 NLRB 788, 788 (1986) (finding employer fulfilled its effects bargaining obligation, even though "[t]he Union [] chose to discuss the decision to close, not the effects, and requested information pertaining to the decision . . . To the extent more extensive effects bargaining did not occur, it was attributable to the Union's lack of interest in pursuing such bargaining"); *GHR Foundry Div. of Dayton Malleable, Inc.*, 275 NLRB 707, 707 (1985) ("[I]t is not the [Employer's] fault that the Union made few specific proposals concerning the effects of the shutdown and that little actual bargaining occurred regarding effects."). The Board simply does not step in years later to second-guess the Union's bargaining choices even where, as here, the Union bypasses decision issues and devotes bargaining time to effects issues.

Instead, the Board's inquiry is whether the employer provided sufficient *notice and opportunity to bargain* prior to implementation, which Triumph did in this case.

V. The Union Fails to Rebut the Additional Grounds for Finding the Parties Reached Impasse on April 19.

Finally, Triumph's cross-exceptions present additional grounds that show impasse existed on April 19, assuming impasse was required to implement the bond shop RIF on April 21. R. Br. at 34-40. These are additional factual and legal grounds not cited by the judge. The Union argues no impasse existed on April 19 based on unsubstantiated claims that it "would have made" more proposals had Triumph delayed the layoff.

The Union's position relies heavily on its bargaining committee's last-minute request for delay on April 19. U. Br. at 38. However, that request came *early* on April 19 and *before* the Company listened and responded to the Union's repetitive proposals. In other words, the extensive discussions that occurred on April 19 mooted the earlier request for delay and made it incumbent on the Union renew the demand or take some other affirmative action to avoid impasse later on April 19. *See Phillips 66*, 369 NLRB No. 13, slip op. at 8 (2020) ("A party's … generalized promises of new proposals do not, without more, demonstrate a significant change in bargaining position" sufficient to break impasse) (quotation and citation omitted). The Union took no such action,[4] and admits in its answering brief that after the April 19 meeting, "it would

[4] After Triumph rejected the Union's proposal (because it consisted of previously-rejected items and other unacceptable proposals) the Union briefly caucused to determine whether it would make a new proposal, returned to the table, and stated: "The union understands the company has rejected our proposal and we don't see resolution coming today." R. Exh. 7 at 1 (2:26 p.m.); GC Exh. 16.

have been futile at that point to reiterate the Union's reasonable request for more time" (U. Br. at 39). Contrary to the Union, however, that is not because of any wrongdoing by the Company, but rather was because the Company already heard the Union's final proposals that still restricted the Company's performance rankings for selection and froze compensation rates post-transfer into assembly – two things the Company consistently rejected since April 7 if not earlier. *See* R. Br. at 20.

On the issue of overall good faith, the Company remained open to an agreement through the entire notice and bargaining period. In fact, the Union acknowledges that Triumph's Senior Director of Labor Relations, Danielle Garrett, said on April 19 "the Company would not move the date if it did not look like the parties were [] going to agree on a proposal," thereby signaling that if material progress occurred on April 19, it might have led to an agreement or extension. U. Br. at 39. This fact reinforces that the Company sought agreement on and before April 19 – a hallmark factor for "good faith." *See Phillips 66*, slip op. at 9 (finding employer bargained in good faith where it "was consistently willing to listen to the Union's proposals, explain its own, and make concessions where it was possible to do so without abandoning its core bargaining position," and overall "act[ed] with … "a sincere desire to reach an acceptable agreement with the Union").

In the end, the Union's answering brief relies on assertions about theoretical topics or breakthroughs that "might" have occurred only if delay was allowed or more sessions scheduled. But at trial, UAW Local 848 President James Ducker was asked to identify specific issues the Union wanted to keep bargaining over after April 19, and he came up with nothing. Tr. 141:14-23, 172:1-6. Given this record, no amount of *post-hoc* legal argument can avoid the impasse

reached on April 19, should the Board find impasse was required on both decision and effects before Triumph could implement the layoff.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief for Triumph's Cross-Exceptions was filed today, March 5, 2020, using the NLRB's e-filing system, and was served via electronic mail on:

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